80-145

No.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

C.FRED UNDERWOOD,
CHLOE UNDERWOOD, and
JACK D. CANON,

Petitioners,

v.

THE SECRETARY OF THE INTERIOR
OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

First: Whether administrative policy holding pumice to be a nonlocatable mineral unless it is used as an abrasive prevails over the Common Varieties Act as written by Congress, which makes pumice a locatable mineral where (1) the pumice

was located prior to July 23, 1955, the date of the Act, or (2) where the pumice deposit has "some property giving it distinct and special value", or (3) where the pumice meets the statutory definition of block pumice by having one dimension of two inches or more.

Second: Whether, upon construing the record as a whole, the Secretary's finding that plaintiffs' ten mining claims were null and void is supported by substantial evidence.

Third: Whether a rule 56 summary judgment is appropriate when based on the administrative file, where there is controversy as to material facts and where the agency is not entitled to prevail as a matter of law.

PARTIES INVOLVED

All parties involved are named in the caption. Cecil D. Andrus is the Secretary of the Interior of the United States of America at present.

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OPINIONS BELOW

The administrative decision of the Interior Board of Land Appeals was published 22 IBLA 62. It is dated September 18, 1975. It is set forth in the Appendix A-5. It incorporates and adopts the opinion of Administrative Law Judge Dean F. Ratzman, which was dated March 5, 1975

The unpublished opinion of the United States District for the Eastern District of California is set out in the Appendix A-51. It was dated June 22, 1977.

The memorandum decision of the United States Court of Appeals for the Ninth Circuit dated March 18, 19 80 is set forth in the Appendix A-1. That court's order denying petition for rehearing was issued May 1, 1980.

JURISDICTION

This petition for writ of certiorari is timely filed within 90 days from May 1, 1980, when the United States Court of Appeals for the Ninth Circuit entered its order denying petition for rehearing.

The statutory provision believed to confer jurisdiction on this Honorable Court is 28 U.S.C. Section 1254.

THE COMMON VARIETIES STATUTE

The pertinent text of the Common Varieties Statute, 30 U.S. C. Sec. 611 is set forth in the Appendix A-68.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of California was the federal court of first instance

It had jurisdiction under 28 U.S.C. Section 1331 to make judicial review of administrative action under the Administrative Procedure Act.

The mining claims were located in 1916, long prior to enactment of the Common Varieties Act of July 23, 1955, 30 USC Sec. 611. When the claims were located, common variety pumice was a locatable mineral. The Act was not retroactive. It applies only to common variety pumice which is located after, not before, the effective date of the Act. Verrue v. United States, 457 F2d 1202 (9th Cir. 1972); Charlestone Stone Products Co., Inc. v. Andrus, 553 F2d 1209 (9th Cir. 1977); Baker v. United States, 613 F2d 224 (9th Cir. Feb. 1980).

The District Court found that the

claims are presently valuable and that the pumice was commercially useful in 1955. A-58.

The Interior Board of Land Appeals found: "There is admittedly much evidence in the record relating to marketability at the time of the hearing." 22 IBLA 64 A-9.

Mr. Emmett Ball, the agency's mineral examiner and chief witness, did not testify that a prudent man would not be justified in spending labor and means with a reasonable prospect of success in developing the claims into a profitable mine, under the "prudent man" rule of Castle v Womble, 19 L.D. 455; Chrisman v. Miller, 197 U.S. 313. Mr. Ball testified that "prudent business men do invest their money in the mining, processing and distribution

of pumice in various areas in the United States. Tr 37.

A block making plant was installed on the claims in 1916-1917 to commercially exploit the pumice deposit. Ex AA, Tr 114, 115. After a couple of years or so, the block making operation of 1916-1917 was terminated because of war time restrictions. Tr 115.

The present day appearance of the claims indicates that substantial amounts of pumice were mined by mining claimant's predecessors in title prior to 1955, for trees about thirty years old are growing in excavated areas. Tr 94

Based on an aerial photograph taken in 1955, Mr. Ball found that ten acres on the contested claims had been mined prior to the date of the

photograph.

Thus there was a specific market demand for pumice from the contested claims. Existence of a general market demand for pumice and its uses is shown by Exhibit FF.

Mr. Ball testified that this property offers "about as economical a mining operation as you can conceive." Tr 51 and that the material is suitable for many commercial uses. Tr 33-34.

The pumice on the claims had a positive commercial value, statewide and county wide. Tr 73 (Ball).

Pumice on the contested claims is expressly excluded from the Common Varieties Act, for it has "distinct and special properties which make it Commercially valuable for use in a manufacturing, industrial or processing operation. 43 CFR Sec 3711.(b)

The Memorandum decision is based on great deference to the agency opinions. But such deference has no probative value where the agency opinions are not supported by substantial evidence.

There is no least comment or mention of evidence in the Memorandum decision given by mining claimants' witnesses: Jack G. Canon Tr 239, C. Fred Underwood Tr 136, Edward W. Morris Tr 273, and mining engineer John K Roof Tr 287. Their evidence not mentioned in the Memorandum establishes commercial operation and commercial demand for pumice and its marketability and saleability both prior to July 23, 1955, and after.

The standard for judicial review of administrative proceedings requires consideration of the evidence in the record as a whole, including evidence opposing the agency's view.

Mr. Ball testified that this pumice has unique characteristics as compared to other minerals which are used for building purposes, like light weight, TR 71 and that blocks made with it, being only half the weight of blocks made with ordinary sand and gravel, offer important advantages both in the cost of shipping and the cost of construction. Tr 40, 41.

Mr. Ball explained that pumice deposits vary in their physical properties, and some pumice cannot be used. Tr 83. Such deposits are not usable and lack the special qualities which make plaintiffs' pumice valuable for block manufacturing.

There is no other available source of pumice suitable for making blocks closer to the mining claimants' Yreka plant than Bend, Oregon, 300 miles distant. The cost of the Bend source was $10 a

ton, while the cost of pumice from the contested claims was $3 a ton. The Yreka plant made a higher profit from blocks made with pumice from the contested claims. Tr 167.

Moreover, the block pumice present on the claims is expressly excluded in the Common Varieties Act from the list of minerals made nonlocatable. Block pumice is defined by the Act as that which occurs in nature with one dimension of two inches or more. Mr. Ball stated that the mining claimants' samples, Exhibits W-1 through W-10, received Tr 158, resemble the pumice which he observed on the various claims. Tr 42-43. The samples, taken by Mr. Underwood from each of the contested claims show pumice with dimensions of two inches or more.

The agency had the burden of proving a prima facie case. Its witness could offer no substantial evidence to show that the large amount of pumice actually removed prior to 1955 from the large excavations was not commercially used. The inference that so much pumice would not have been mined if it had not been economically rewarding has not been overcome by the agency's testimony. Since the agency did not establish absence of commercial exploitation of the deposit prior to 1955, there was no prima facie showing for the mining claimants to overcome and no burden of proof shifted to them. The fact that successful commercial use of the deposit was made after 1955 by Stewart Masonry, using the same road system which existed prior to 1955, shows that lack of a road system giving access did not prevent commercial use

of the deposit by the mining performed earlier, and the agency surmise based on inaccessibility of the deposit has no evidentiary support. As a consequence the mining claimants' motion to dismisss, timely made, should have been allowed.

The agency's Rule 56 motion for summary judgment should have been denied. It was not justified by the administrative record. Inadequacy of the administrative record cannot be supplied by surmise and conjecture. The decision below, which is based on guesswork should be reversed.

REASONS FOR GRANTING THE WRIT

There are special and important reasons why the writ of certiorari should be granted in this case. The principal issue is whether agency policy should be allowed to invalidate mining claims which are held in compliance with the

mining law as written by Congress. The Court of Appeals decided an important question of federal law which should be settled by this Court.

If the agency's decision stands, it means that the agency makes the laws, not Congress, for the decision amounts to a legislative enactment by an executive tribunal. The agency possesses no such authority under our system of separation of powers. Baker v. United States, 613 F2d 224 (9th Cir. Feb. 10, 1980).

In Baker, it was held that the agency's adoption of the "Too Much" rule was "an abuse of discretion which was contrary to existing mining law. The result reached was arbitrary and capricious." Here, the agency's adoption of a rule that pumice is not locatable unless it is used as an abrasive,

rewrites the provision made by Congress in 30 USC Sec 611 that block pumice, having one dimension of two inches or more is a locatable mineral. Congress established the criterion for distinguishing locatable block pumice from nonlocatable pumice as the dimension in which it occurs naturally; not the use made of the pumice. If Congress had wanted to distinguish between block pumice used as an abrasive as compared to block pumice used for other purposes, it would have stated this basis for excepting block pumice from the section making other types of pumice non-locatable.

A dialogue during Congressional hearings in 1955 between Senator Malone of the U.S. Senate Committee on Interior and Insular Affairs and a Mr. Holbrook, an attorney for a mining company, clarifies this point and shows that

Congress distinguished locatable from nonlocatable pumice on the basis of the size in which it occurs naturally.

"Senator MALONE. Does this not do away entirely with the sandstone, gravel, pumice, pumicite, cinders, clay, and pumice stone?

"Mr. HOLBROOK. Yes; it does.

"Senator MALONE. It cuts all that out.

"Mr. HOLBROOK. Yes; it does, Senator. I was speaking of the overall principle that you had been discussing with me, as to the minerals that can still be located under the mining law.

"Senator MALONE. Pumicite is building material, is it not?

"Mr. HOLBROOK. Well, I thought it was primarily an abrasive.

"Senator MALONE. Yes; but do they not use it, and cinders and clay and pumice, for blocks of some kinds of buildings?

"Mr. HOLBROOK. I think they do, yes. I think so. That is right.

"Senator MALONE. But you would cut all that out. You would not have anything to do with that.

"Mr HOLBROOK. You could not locate for those minerals under the mining law.

"Senator MALONE. Under the amendment?

"Mr. HOLBROOK. That is right.

"Senator MALONE. But you can now?

"Mr. HOLBROOK. Yes sir.

"Senator MALONE. Well now, why do you want to cut them out?

"Mr. HOLBROOK. They are not totally cut out, Senator. Pumice, more than two inches in diameter, in one dimension, would not be excluded. Clays which have peculiar properties would not be excluded.

"Senator MALONE. Well, now, pumice that is in place--you are talking about gravel, or an aggregate?

"Mr. HOLBROOK. Well, I understand that pumice occurs very generally. I am not a geologist. You probably know much more about that than I do. But over great areas--it is a volcanic ejector, so I am told, and it may be small, and some of it occurs in larger blocks. And that is not excluded from location under the mining laws.

"Senator MALONE. But you would be excluded from taking this aggregate of pumice?

"Mr. HOLBROOK. If it is less than 2 inches in one dimension, you would.

"Senator MALONE. Well, now, wherever you find this, is it not a good deal like any other rock, that if you dig a little bit you are likely to find it in place? You know, sometimes there is a flow of this. There is a lava flow. Some of it is in place, and some of it over a few million years has disintegrated. It is like your placer. If you follow it far enough, you will find a ledge sometimes. You do not always find it. It is generally there someplace.

"Mr. HOLBROOK. Wherever you find pumice of those dimensions, it would still be locatable under the mining laws.

"Senator MALONE. Then you would have to dig down through it or go back to where you find the pumice in place, or in chunks larger than 2 inches in diameter, in order to locate it. Then you could locate it.

"Mr. HOLBROOK. That is right, Senator, it has been very carefully reviewed, with the thought that it would not materially interfere with mining operations."

Multiple Surface Uses of the Public Domain Amendments, Hearing on S. 1713 before the Comm. on Interior and Insular Affairs, 84th Cong. 1st Sess. 40-41 (1955) (emphasis added.)

If the agency's abrasive use rule stands, owners of unpatented mining claims who produce pumice for uses other than abrasives will find that they are trespassers, that their mining claims are invalid, that they are liable for damages for the pumice that they have produced for non-abrasive uses from their claims.

The abrasive use rule invented here by the agency is arbitrary, capricious and unreasonable. It deprives the public from locating domestic sources of pumice used as aggregate in building blocks, used for insulation, used for filtering fluids, used for sound proofing, and used for hundreds of non-abrasive uses.

Here, the agency's abrasive use rule makes unlocatable pumice deposits not used for abrasives, when the Common Varieties Act makes locatable (1)

the pumice located prior to the date of the act or (2) a pumice deposit which has "some property giving it distinct and special value" or (3) pumice which meets the statutory definition of block pumice by having one dimension of two inches or more.

There is a conflict between the decision of the Ninth Circuit herein and decisions of other courts of appeals on the same matter. The standards of review of administrative proceedings differ. The great deference for the Secretary's opinion, finding some isolated bits of evidence to support that opinion, in the Ninth Circuit, is contrary to the standard of review called for by this Honorable Court in Universal Camera Corp. v. N.L.R.B., 340 U.S 474, hblding that a reviewing court should set aside an agency decision when it cannot find that the evidence supporting that decision is substantial,

when viewed in the light of the record in its entirety, including the evidence opposed to the agency's view, 340 U.S. at 488. The Supreme Court (Mr. Justice Frankfurter) stressed that reviewing courts must be influence by a feeling that they are not to abdicate the conventional judicial function. Id.490.

The Third Circuit followed Universal Camera and exercised "the conventional judicial function" and concluded that the finding of the Federal Security Administrator establishing a standard of identity for salad dressing was not supported by substantial evidence when the record was considered as a whole. Cream Wipt Food Products Co. v. Federal Security Administrator, 187 F2d 789 (1951).

The Fourth Circuit followed Universal Camera in Litton Dental Products Etc. v. N.L.R.B., 543 F2d 1085, 1087 (1976). It

concluded that the Board's decision and order were entirely lacking in the substantial support in the evidence that is indispensable to Board action.

The Fifth Circuit discussed the appropriate standard of review in Mueller Brass Co. v. N.L.R.B., 544 F2d 815 (1977) and noted that if, after a full review of the record the court was unable to conclude that the evidence supporting the Board's determinations is substantial, it should deny enforcement.

In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S.402, the Supreme Court reversed the Sixth Circuit's decision, which affirmed a district court's summary judgment in favor of the Secretary of Transportation's administrative determination, and remanded the case to the district court for "plenary review" of the administra-

tive decision, allowing the court in its discretion to remand the cause to the appropriate agency and official for further proceedings, if necessary.

The Court of Appeals for the Tenth Circuit recognized conflict with the decisions of the Court of Appeals for the Ninth Circuit in Nickol v. United States, 501 F2d 1389, 1390, "One court has characterized a judicial determination of whether a finding of fact (in an administrative proceeding) is supported by substantial evidence as 'only a question of law' and therefore subject to disposition by summary judgment'. Dredge Corp. v. Penny, 338 F2d 456 (9th Cir.). See also Beane v. Richardson, 457 F2d 758 (9th Cir); Henrikson v. Udall, 350 F2d 949 (9th Cir); ..." "The very purpose however of such judicial review of agency

action is to examine the facts in the record. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 at 484" The Tenth Circuit held in Nickol that entry of a Fed. R. Civ. P. 56 type of summary judgment is precluded where a court must determine whether an agency determination is 'unsupported by substantial evidence and where there is 'substantial controversy' as to the material facts in the record.

For the foregoing reasons, your petitioners pray that a writ of certiorari to the United States Court of Appeals for the Ninth Circuit issue and to permit petitioners to present their case on the merits.

Dated: July 25, 1980.

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OF THE UNITED STATES OF AMERICA

Respondent.

APPENDIX TO ACCOMPANY PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C. FRED UNDERWOOD, CHLOE UNDERWOOD, and JACK D. CANON, Plaintiffs-Appellants	)	No. 77-3578
v.	)	
THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA, Defendant-Appellee	)	

MEMORANDUM
(March 19, 1980)

Appeal from the United States District Court for the Eastern District of California

Before: THORNBERRY*, SCHROEDER and FARRIS, Circuit Judges

This is an appeal from summary judgment entered by the district court concerning the validity of appellants' pumice claims. Appellants contend that the Interior Board of Land Appeals erred in finding, first, that these claims were not discovered prior to July 23, 1955, and, second, that the pumice deposit had no special and distinct value to make the claims presently locatable under 30 U.S.

*Honorable Homer Thornberry, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

C. Sec. 611.

Section 611, denying validity to claims of common varieties of pumice and other deposits, applies only to claims established after its effective date, July 23, 1955. Appellants maintain that there was a marketable claim prior to 1955 because at that time there was a market for pumice in California and because aerial photo evidence indicated that some pumice had been removed from this claim prior to 1955. There was, however, no evidence of profitable sales from the claim prior to 1955, and testimony and documentary evidence established that the lack of roads to this remote area made it very unlikely that pumice could have been extracted and sold at a profit prior to 1955.

We believe that appellants' claim of marketability prior to 1955 is governed by this Court's recent holding in Rawls v. United States, 566 F2d 1373, 1376 (9th Cir. 1978):

> "Absence of sales in the critical period, though relevant, will not alone support a finding of unmarketability and non-discovery. When there is little or no evidence of pre-1955 sales, a court should consider costs of extraction, preparation and transport as well as the level of then-existent market demand.

These cost and transport factors were before the Board. The record contains substantial evidence to support the Board's finding of non-marketability.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L.Ed. 2d 136 (1971); Multiple Use, Inc. v. Morton, 504 F2d 448 (9th Cir. 1974).

Appellant also contends that, even if the claim fails under pre-1955 marketability standards, it nevertheless is presently locatable because of "some property giving it distince and special value." 30 U.S.C. Sec. 611. At the hearing appellants did not contend that this pumice had any distinctive or unique qualities. On appeal to the Interior Board of Land Appeals they urged that the pumice was well suited for use as a concrete aggregate. The record, however, congains evidence that most of the pumice produced in California is used for that purpose. The Board properly determined that this pumice was a "common variety." United States v. Coleman, 390 U.S. 599, 88 S. Ct. 1327, 20 L. Ed 2d 170 (1968).

The statute specifically exempts "so-called block pumice' which occurs in nature in pieces having one dimension of two inches or more." Appellants next contend that the stone which they are quarrying is "block pumice" within the meaning of the statute and thus not a common variety. They interpret the statute to mean that any pumice claim which includes some pieces with a dimension of two inches or more is "block pumice."

The Department urges the view adopted by the Board in United States v. Thomas,

78 I.D. 5 (1971), that the term refers to pumice of that dimension which is also used in block form as an abrasive. See H.R. Rep. No. 730, 84th Cong. 1st Sess. 9 (1955). The Department's interpretation is entitled to great deference by the courts. Red Lion Broadcasting Co. v. F.C. C., 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed2d 371 (1969). This interpretation is also supported by the language of the statute which does not exempt all pumice with pieces of a certain size, but refers instead to "so-called 'block pumice'".

We agree with the Board that the term "block pumice" refers to a generic category of stone identifiable by some quality in addition to mere size. Appellants repeatedly referred to use of the pumice as a concrete aggregate but never suggested the possibility of use as an abrasive.

The Board's decision was fully supported in all respects by the evidence, and the summary judgment of the district court is affirmed.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

UNITED STATES CA 448
V.
C. FRED UNDERWOOD ET AL.

IBLA 75-401 Decided September 18, 1975

Appeal from a decision of Administrative Law Judge Dean F. Ratzman declaring Pumice Stone Mine Claims Nos. 1, 2, 5,6, 9,10,13-16 null and void for a lack of a discovery of a valuable mineral deposit.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims; Contests--Mining Claims; Discovery: Marketability.

   Where the Government has presented a prima facie case that a claimed mineral is a common variety pumice and further that the pumice was not marketable at a profit as of July 23, 1955, the burden of showing by a preponderance of the evidence either that the mineral is an uncommon variety or that it was marketable as of July 23, 1955, devolves upon the mineral claimants.

2. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Discovery: Marketability.

   A deposit of pumice is not an uncommon variety of pumice merely because it can presently be mined, removed and marketed at a profit.

Rather, a mining claimant who asserts discovery of pumice must show that the deposit has a distinct and special value over other marketable deposits of pumice.

22 IBLA 62

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for the contestees; Charles F. Lawrence, Esq., Office of the General Counsel, United States Department of Agriculture, San Francisco, California, for the contestant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

C. Fred Underwood, Chloe Underwood and Jack D. Canon appeal from a decision of Administrative Law Judge Dean F. Ratzman, dated March 5, 1975, Contest CAlifornia 448, involving the invalidation of 10 association placer claims, the Pumice Stone Mine Claims Nos. 1, 2, 5, 6, 9, 10, 13-16, located in secs. 14, 23, 24, 25, and 26, T. 43 N., R. 2 E., M.D.M., Siskiyou County, California. In his decision Judge Ratzman found that the Government had presented a prima facie case that the pumice from the claims was not marketable as of July 23, 1955, and that the testimony showed that the pumice was a common variety pumice such as was removed from location under the mining laws by the Act of July 23, 1955, 30 USC ¢611 (1970). Further, he found that the contestees failed to overcome the Government case, and, indeed, had bolstered the Government's showing that the pumice was not marketable at the critical date.

On appeal the contesees present a number of arguments as to the incorrectness of Judge Ratzman's decision. A careful review of the record, however, shows that Judge Ratzman's decision was clearly correct and we hereby adopt that decision which is appended hereto. It is unnecessary to recapitulate the facts which the evidence adduced as they are set out in detail in the Judge's review. Rather, we will confine this decision to a discussion of a number of legal contentions presented in the appeal.

(1) The first issue which contestees raise is stated as follows: "The fact that other material is available does not constitute the substantial evidence required to support the conclusion of the agency, when as here, there is positive evidence in the record of marketability," citing United States v. Verrue, 457 F2d 1202 (9th Cir. 1972). This statement confuses two discrete concepts. Assuming that the material located is a common variety pumice removed from location by the Act of July 23, 1955, supra, a question examined infra, and that the Government has presented a prima facie case that the mineral was not marketable at a profit as of July 23, 1955, as well as the present time, it devolves upon the mining claimants to preponderate with evidence showing that the mineral was marketable both on July 23, 1955, and at the time of the hearing. United States v. Barrows, 404 F2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969); cf. United States v. Clear Gravel Enterprises, Inc., 505 F2d 180 (9th Cir. 1974).

We agree with Judge Ratzman that the Government made a prima facie case of no discovery of a valuable mineral deposit as of July 23, 1955. It has been the consistent position of the Department that non-production of minerals is sufficient to raise a presumption that the claimed minerals were not marketable at a profit. See, e.g., United States v. Gibbs, 13 IBLA 382, 388 (1973); United States v. Stewart, 5 IBLA 39, 79 I.D. 27 (1972). Such was the testimony in the instant case, and a prima facie case was made on behalf of the Government.

Contestee's reliance on Verrue, supra, is totally misplaced. In Verrue, supra, the United States Court of Appeals for the Ninth Circuit, in reversing the finding of ivalidity of a single claim, stated:

> It appears that the Secretary's decision was based solely on his findings that there were no sales of sand and gravel at a profit from the claim and that there was evidence of an abundance of material in the area other than on the Sandy No. 2 claim, despite the uncontradicted evidence introduced by appellee that the material on Sandy No. 2 was marketable at a profit during the 1946-1948 period. * * * In our opinion the lack of evidence as to sales and the fact that there was other material available does not constitute the substantial evidence required to support the conclusion of the Secretary, where, as here, there is positive evidence in the record of marketability. (Emphasis supplied.)

Id. at 1204 (footnote omitted).

Verrue, therefore, at most stands as a finding that the contestee in that case preponderated on the issue of marketability on or before February 10, 1948, the date of withdrawal. The situation in this case, however, is different.

There is, admittedly, much evidence in the record relating to marketability at the time of hearing. But, as Judge Ratzman found, there was no evidence that would indicate marketability as of July 23, 1955. Thus, C. Fred Underwood, one of the co-locators, engaged in the following dolloquy with the Government's counsel:

> Q. Do you have any additional knowledge, a comparable knowledge as to what the conditions were prior to--prior to July 23, 1955?
>
> A. July 23.
>
> Q. I mention that date. It's related to a law that changed the mining laws.

> A. Yes. No, I'm sorry, I have no knowledge of these claims prior to our purchase of them, except what I have told you of our experience through Mr. Stewart who was using them prior to our purchase of the claims.
>
> Q. Then I assume that you would not be able to state whether or not any material had been either sold from these claims or removed from them in, say, 1954?

A. I could not state that that was true, no, sir.

Q. And would that be true also from 1955?

A. Yes, sir.

Q. 'Six, 'seven, 'eight, 'nine, up through 1964?

A. Mr. Stewart obviously was removing pumice prior to our purchase, because, as I say, we had seen it in his yard in his use. But who used it, if anyone, besides Mr. Stewart, I have no direct knowledge, sir.

Q. Then upo to the year 1964, the only knowledge of removal that you have is that material had been used by Mr. Stewart as of that date?

A. Yes, sir.

Q And possibly earlier?

A. Yes, sir. (Tr 188-189

In an exchange with Jack D. Canon, another co-locator, the Government counsel asked:

Q Do you have any knowledge as to any preceding '71, 1971, as to the amount of pumice removed from the claims?

A No.

* * * * * * * * * * * * * * *

Q. You weren't concerned with any efforts to market the material from the claims?

A. Yes.

Q Prior to '71?

A No. (Tr 270, 271).

Of course, actual sales of minerals from a claim is not an absolute requisite to a claim's validity. See, e.g., Verrue v. United States, supra; Palmer v. Dredge Corporation, 398 F2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969). But the colloquies set out above are virtually the only discussions in the instant case which do more than tangentially touch upon marketability on the critical date. Furthermore, as Judge Ratzman noted, the documentary submissions of the contestees tended to prove that the material was not marketable. For example, Exhibit FF, a 1956 publication of the State of California Department of Natural Resources, Division of Mines, entitled Pumice, Pumicite, and Volcanic Cinders in California, described the pit on the south side of Paint Pot Crater as abandoned. (Ex FF at 28). See also Judge Ratzman's decision, infra.

When Congress passed the Act of July 23, 1955, supra, it was not stating that the common varieties of listed minerals lacked any economic value. What Congress said was that henceforth, regardless of any economic return which an individual might be able to obtain, common variety minerals could not be located under the mining laws of the United States. Had

these claims been located after that Act for a common variety mineral the issue of marketability would be an irrelevancy, for such claims would be void ab initio. The only claims for common variety minerals saved from the proscription of the Act were those claims upon which a discovery of a valuable mineral deposit existed as of the date of that Act. The marketability test, as the Supreme Court has noted, is an effort "to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable'," United States v. Coleman, 390 U.S. 599, 602 (1968), and is an integral part of the determination of a discovery. In the same manner that the mere fact of present marketability will not permit the location of a claim for common variety minerals subsequent to the Act of July 23, 1955, so too, a showing of marketability some 20 years after thepassage of that Act cannot resuscitate a claim located prior to the Act when it cannot be shown that the minerals from the claim were marketable on the critical date. We find that Judge Ratzman correctly held that there was no discovery of a valuable mineral deposit as of July 23, 1955.

22 IBLA 66

(2) The second ground of appeal is that the pumice deposits are an uncommon variety of pumice, and as such are removed from the proscriptions of the Act of July 23, 1955, supra.

Contestees first attempt to show that the use of pumice in lightweight

blocks provides those blocks with various advantages over conventional concrete blocks. We are unable to see the relevance of this observation. The Act of July 23, 1955, provides in pertinent part, "(n)o deposit of common varieties of * * *pumice, pumicite, or cinders * ** shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States * * *." Section 3 of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. Sec 611 (1970). The fact that pumice has advantages over other aggregates does not, by any stretch of logic, determine that the pumice is an uncommon variety pumice. Without evidence that pumice, similar to that found in great abundance elsewhere, has a property giving it a special and distinct value over other pumice, it is a common variety no longer locatable under the mining laws.

The second thread of contestees' argument is that some pumiceis not suitable for aggregate and that the pumice deposit embraced by the claims is so suitable and thus has a "distinct and special value" so as to except it from the prohibition of the Act of July 23, 1955. If contestees are saying that any pumice not suitable for aggregate has no commercial value, and that the special and distinct value of this pumice is that it has commercial value, they are in effect contending that the Act of July 23, 1955, supra, was a nullity. The only effect of the Act under such an analysis would have been that thereafter no claim could be located for worthless pumice. But the mining laws never enfisaged a system wherein worth-

less minerals could be validly located. Thus, the Act of July 23, 1955, contemplated that common variety minerals, even though possessed of economic value, could not be located subsequent thereto. 1/

If, on the other hand, contestees are arguing that concrete aggregate use is a limited special use for which the great mass of pumice cannot be used, they runafoul of their own documentary submissions. According to charts in Exhibit FF the prodominant use of all pumice mined in California from 1947 to 1953, was as

aggregate in concrete, in 1951 rising to over 95% of all use within the State, (Ex. FF, Figure 15 at 23). According to the Minerals Yearbook, 1971 (Ex.CC) concrete admixture and concrete aggregate accounted for 32% of the United States consumption of pumice in 1971, (Ex. CC at 1011). It is clear that the use of pumice as a concrete aggregate is common. We expressly find that the pumice involved embraced by the subject claims is a common variety. 2/

1/ A further argument that upholding the nullification of the claims will destroy possible jobs and other economic benefits which could arise from development of the claims overlooks the fact that common varieties of pumice may be disposed of by the Government in accordance with the Materials Act of 1947, as amended, 30 U. S.C. Sec 601 (1970).

Contestees' other assertions have

2/At one point in their brief on appeal contestees raise the point that the pumice located within their claims is "block pumice" and so removed from the purview of the Act of July 23, 1955. Section 3 of the Act provides that "'Common varieties',* * *does not include so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more." 30 U.S.C. Sec 611 (1970) Not once in the entire hearing did contestees ever asset that they had located a claim for "block pumice." Exhibit FF discusses the occurrence of "block pumice" in Northern California (Ex. FF at 26-27.) It states, in part, "(p)umice suitable for the manufacture of scouring blocks has been produced from two places in the Glass Mountain area; from pumiceous obsidian blocks obtained from the surface of Glass Mountain and from pumice blocks mined from pumice breccia which crops out near the base of a pumice cone on the northwest side of the Glass mountain obsidian flow." Id. at 26. Glass Mounain is located in T. 44 N. R. 4 E., M.D.M., whereas the claims in the instant case are in T 43 N., R 2 E., a distance of well over ten miles. Furthermore, there was no testimony that any of the mined pumice was used as scouring blocks. Thus, the elventh hour attempt to validate these claims as "block pumice" claims must be rejected as totally at variance with the facts.

been substantially dealt with within the above analysis. Contestees' attempt to argue that marketability was not an issue is belied by the entire record of the hearing, as well as the fact that in order to show a discovery there must be a showing of marketability. Contestees, once again, are attempting to obscure the necessity of a showing of marketability by equating it with a requirement that the material must actually have been marketed at a profit. This Department has never imposed the latter test, but proof of a discovery presupposes the former.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, the decision appealed from is affirmed.

/s/ Douglas E. Henriques
I concur: Administrative Judge
/s/ Edward W. Stuebing
Administrative Judge

I concur in the result:

/s/ Joan B. Thompson
Administrative Judge

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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
Hearings Division
Room W-2426, Cottage Way
Sacramento, California 95825
March 5, 1975

United States of America,
Contestant

v.

C. FRED UNDERWOOD, : CALIFORNIA 448
CHLOE UNDERWOOD, AND:
JACK D. CANNON, : Involving Ten Placer
Contestees : Mining Claims in
Secs. 14, 23, 24, 25
and 26, T. 43 N., Range
2 E.,M. D M. Siski-
you County, California
(Pumice Stone Mine Nos.
1,2,5,6,9,10, 13, 14
15, and 16).

AMENDED DECISION

Appearances: J.P. Correia For Contestees
Correia and Bacon
Attorneys at Law
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Office of General Contestant
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MINING CLAIMS DECLARED NULL AND VOID

General Background

Ten unpatented placer mining claims are being contested by the Bureau of Land Management in this proceeding. The claims lie within National Forest boundaries, and the contest was initiated by the Bureau at the request of the Forest Service. The charges in the contest Complaint are as follows:

"A. There are not presently disclosed within the boundaries of the mining claims, nor were there

disclosed from before July 23, 1955, to the present, minerals of a variety subject to the mining laws sufficient in quantity, quality and value to constitute a discovery.

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B. The land embraced within the claims is nonmineral in character."

The contested claims were located on 1600 acres of public lands in May, 1916. A timely Answer filed on behalf of the contestees controverts the charges in the Complaint, and avers that the land "embraced wtihin the claims, and each thereof, is mineral in character and has for many ears been and is now mined for valuable minerals, to-wit, sand, stone, gravel, pumice, pumicite and cinders, and that said minerals have since the location of...said mining claims in 1916 and the years subsequent thereto been mined and operated as a mine and mines for the production of said minerals, all of which said minerals are valuable and have been and are found in quantity and quality merchantable and suitable for building purposes...andhave always had and now have positive commercial value...."

At a hearing held in Medford, Oregon on September 12 and 13, 1974, the attorney for the mining claimants introduced exhibits relating to pumice deposits, and use of pumice, in California. One of the documents, Exhibit FF, is Bulletin 174 of the Department of Natural Resources,

State of California, entitled Pumice, Pumicite, and Volcanic Cinders in California (published in 1956), which states in part:

> "Pumice, pumicite, and volcanic cinders are products of explosive volcanic activity. They are mined from volcanic and pyroclastic rocks that range in age from early Tertiary to Recent and are widely distributed throughout California.
>
> * * *
>
> Deposits of pumice and pumicite range in size from a few thousand tons to hundreds of thousands of tons. They contain layers of pumice tuff that range from a few feet to well over 100 feet in thickness.
>
> * * *
>
> Some pumice and pumicite deposits were mined by underground mining methods. Present production, however, is from quarries where the material is mined by open pit methods. The loosely consolidated tuffs commonly require only a bulldozer or dragline to mine the

> pumice . . . .whereas blasting is required to break down the pumice in well consolidated tuffs.
>
> Very little pumice, pumicite, or volcanic cinders is used directly as mined from the quarry. Some crushing and screening are necessary to produce materials and aggregate for specific uses, which in-

clude concrete aggregate, insulating plaster, interior and exterior stucco, abrasive, cleansing and scouring compounds, fillers in rubber and paints, cement additive, insecticide, carrier, and soil conditioner.

* * *

The first recorded production of pumice in California was about 60 tons in 1883. From 1909 to the late 1930s most of the pumice and pumicite output in California was used for abrasive purposes. From the latter part of the 1930s to date more of the pumice output has gone into construction where it was used as aggregate in concrete either for precast blocks or slabs, or for monolithic structures. The total combined output of pumice and pumicite in California from 1909 to 1953 was 1,801.564 short tons valued at $9,059,030. * * *

* * *

During World War I the use of pumice as lightweight aggregate was investigated, but the actual production of pumice for aggregate purposes did not commence until mid-1930s. * * * ... with the outbreak of hostilities in Europe in 1939, and the final culmination of World War II, the demand for lightweight aggregate materials for both military and domestic consumption increased markedly.

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Pumice properties throughout California and other western states were developed and numerous public

buildings as well as domestic dwellings were constructed of pumice concrete. The widespread use of pumice as aggregate has extended into the post-war period and probably will continue to overshadow its use as an abrasive.

* * *

Most of the deposits of pumice, pumicite and volcanic cinders in California are readily accessible to consuming markets by rail or highway transportation.

These volcanic materials - pumice, pumicite, and volcanic cinders are abundant in California and the reserves are large enough to support the vigorous expanding building industry." pp. 5-6.

Figure I in Exhibit FF depicts more than 40 locations scattered over the length and breadth of California, described as "areas underlain by Tertiary to Recent volcanic rocks, and major regions under which the deposits of pumice, pumicite, and volcanic cinders are discussed." By far the largest of these areas is shown in northeastern California. A listing of more than 35 sources of pumice, situated in 19 California counties, is provided in Exhibit FF, pp. 90-92.

The contested claims lie within an area of pumice which is at least 16 square miles in area. Exh. FF, p. 27. Also a ten square mile area of pumice (Glass Mountain) lies approximately ten miles to the east.

Figures 13 and 15 in Exhibit FF are charts which disclose that production of pumice and pumicite in California rose to more than 260,000 short tons in 1951, but by the 1953-1954 period had declined to the 75,000-80,000 range. The decreased production was attributed "almost wholly" to the increased demand for a competing material, expanded and sintered shale aggregate. Exhibit FF, p. 6.

Exhibit FF provides a description of pumice areas which were commercially operated in the mid-1950s. The principal properties operated for aggregate in Siskiyou County at that time were the Thompson Pumice Company Deposit and the Boorman Pumice Products Deposit. Thompson Pumice had available

two sections of land and operated one quarry 600 feet by 300 and another 300 feet by the 150 feet. The pumice was hauled "over well graded roads about 11 miles to Tionesta (California) a small settlement on the Great Northern Railroad, where it is loaded directly into gondola cars for shipment, or crushed and screened for shipment." Thompson supplied pumice to processing plants at Klamath Falls, Oregon, to block plants in the San Francisco Bay area, and to local block plants.

The Boorman concern had pumice in two sections and quarried from pits that were served by a "well graded dirt road that leads to Tionesta bout nine miles east." Boorman had mined and shipped large tonnages of pumice from its property to block plants in Klamath Falls,

Oregon, and in the San Francisco Bay area. In 1953 the main Boorman pit measured about 100 feet by 100 feet.

Volcano Products at one time mined and shipped pumice from unpatented mining claims, including 3411 acres near Glass Mountain. However, Exhibit FF does not state specifically that Volcano Products was an active mining operation in the 1950s. pp. 25-26.

Exhibit FF contains information on the Little Glass Mountain deposit (which lies 8-10 miles west of the operating mines which are discussed above). It states that most of the Little Glass Mountain pumice is comparable to the pumice at Glass Mountain. The Bulletin provides the following information relating to the location occupied by the contested claims:

> "Perhaps the first pumice mined in this section of Siskiyou County was at an abandoned pit on the south side of Paint Pot Crater as early as 1905... Considerable research was done on this pumice to determine its field of usefulness and it was found that the pumice was suitable for the manufacture of concrete blocks. Latest recorded production was in 1935 (Averill, 1935, p. 335) although there has been a small amount of pumice mined for test purposes since then." Exh. FF, p. 28. Emphasis added.

Another source of pumice on or near Little Glass Mountain described in Ex-

hibit FF is the Pumice Stone Mines property, 2560 acres of easily mined pumice with large reserves. As of 1956 there had been very little pumice mined from Pumice Stone Mines. Because it was named as the source of materials for the Shastalite Brick Company, of Yreka, California, the Hotlum Cinder Deposit should also be mentioned. The contestees regard the Yreka area as one to be served from the contested claims (at least in the 1970s). Exhibit FF states that in June, 1955, a quarry at Hotlum, running 250 feet along a canyon, with a face averaging 20 feet high, was the source of materials for the Shastalite block operation and for other nearby towns. The Bulletin states that the Hotlum cinders weigh about 40 pounds per cubic foot and were being used for making concrete building blocks, p. 29.

Exhibit DD, Geology of Northern California, Bulletin 190 of the California Division of Mines and Geology, issued in 1966, reported that about 30,000 tons of pumice and pumicite (about one-third of the annual production in California) were mined in Northeastern California regions "with almost all coming from deposits at Glass Mountain, eastern Siskiyou County," Emphasis added. It describes the quarrying and trucking of the material in the Tionesta area, and in Modoc County. There is no reference to production at Little Glass Mountain, Pumice Mountain or Paint Pot Crater. Exhibit EE, a 1961 Siskiyou County Economic Resource Inventory, explained that the county's

deposits of pumice, pumicite, volcanic cinders and perlite constituted "a stable industry base," but that "most of these have only been worked in a relatively small way because of remoteness."

Another in the series of exhibits introduced on behalf of the mining claimants, Exhibit BB, Bulletin 630 of the Bureau of Mines (Department of the INTERIOR) 1965 edition, refers to one of the factors involved in the production and profitable disposal of pumice:

> "Pumice used as a concrete aggregate, railroad ballast, and for road surfacing, is sold in a low price market and must compete with many substitutes. Hence the market area for any deposit is limited by transportation costs and the availability of competitive materials * * * "

In setting forth the above facts, which either are not disputed, or are provided in documents added to the case record by the contestees, I have directed attention to the general pumice supply and pumice marketing conditions in 1955 and the period extending from that year into the mid-1960's. The situation with respect to access to the contested claims and the over-all requirement for pumice blocks (as opposed to other materials such as fir and hemlock lumber) has changed substantially in recent years.

An effort was made by the contestees to establish and maintain facilities on

the claims in order to supply pumice for concrete block facilities. This activity was discontinued. At the hearing, individuals who have leased the claims outlined their proposals for utilization of the pumice deposit, and their expectations for invading and capturing the market. However, all of this comes almost two decades after passage by the Congress of the legislation which required the existence of a discovery of valuable minerals on each claim in the summer of 1955. Rather than speculate on the propects of the lessee's new business venture, I will direct my attention principally to the charge that there was no disclosure "from before July 23, 1955, to the present, of minerals of a variety subject to the mining laws, sufficient in quantity and quality, and value to constitute a discovery." the quantity and quality of the pumice has not been seriously questioned. This contest actually comes down to the inquiry which arises time after time in proceedings of this type--when a material exists in quantities vastly exceeding market requirements, which of the unpatented mining claims located for that material are considered to contain a discovery, and which are to be rejected on the basis that material obviously could not have been marketed from each andevery one of the available sources.

SUMMARY OF RELEVANT EVIDENCE

Mr. Emmett Ball, a graduate mining engineer with more than 20 years of experience in that profession, testified

for the Forest Service. In 1971 he inspected the contested claims at a time when the present claimants wished to haul pumice to Yreka, California to be used as aggregate in concrete blocks. Mr. Ball and representatives of the contestees drove to "three places... that somebody had mined in prior years," Tr 9. Two of those places were marked by Mr. Ball on Exhibit 9, an enlarged 1955 aerial photograph. Excavated area "1" and most of area "2" are on Pumice Stone Mine Claim No. 15, and the remainder of area "2" is on Claim No. 14. The third location does not show as a worked or excavated area on the 1955 photograph (Exhibit 9), but was marked as area "3" in Claims 13 and 14 in that Exhibit. On July 29, 1971, when the examination was made, Mr. Ball did not learn when pumice had been removed from areas "1", "2" and "3". The first removal of material from area "3" was between 1961 and the summer of 1971. Tr 11, 16. The mining claimants wished to start their 1971 mining and hauling activities in Area "3". Areas "1" and :2: are on the east side of Paint Pot Crater, which could be reached from a road system that existed in 1955. Area "3", on the west side of Paint Pot Crater, was not served by a road in 1955 (Exhibit 9) or in 1961 (Exhibit 8).

Mr. Ball found that there is pumice "practically everywhere" on the contested claims, in varying depths. His observations confirmed that "five plus" square miles of pumice cover the terrain in the vicinity of the claims, and that the

Glass Mountain deposits to the east approximately ten airline miles away were being mined. Assuming an average

depth of a yard, he estimated that there are almost eight million yards of pumice on the contested claims. Mr. Ball did not see block pumice on the claims--he observed material running from very fine up to two inches in diameter. Tr 15. Other than quantities required for testing, the mining claimants had not removed any pumice as of July 29, 1971. The claims had been transferred to them approximately six weeks earlier. Exhibit 2.

Only a few loads of pumice have been removed from areas "1" and "2" in recent years. The presence of trees averaging seven to nine years old on these areas demonstrates that they have been undisturbed for a substantial period of time. There are indications that samples have been taken from Claims "1", "2", and "3". Tr 20.

In their discussions with Mr. Ball, the claimants did not express an interest in material on the claims other than pumice. He found that the roads in and around the contested claims had been constructed with a bulldozer, and that the pumice, "the native material" had been used for the road base. He gave as examples toads shown on .Exhibit 9, including the one which runs from the bottom of the photograph (on the right side) to an intersection which can be seen in the upper one-third of that exhibit. Tr 24.

The widow of the former owner of Stewart Masonry in Redding, California, in-

formed Mr. Ball that Stewart Masonry leased the contested claims in "about 1962" and hauled some pumice soon after that. At the time of his conversation with Mrs. Stewart, in 1972, Stewart Masonry was no longer hauling appreciable quantities of pumice from the area and had not done so for several years. Tr 27. A letter dated July 19, 1963, from the District Ranger of the Forest Service to Mr. Burt Stewart Icontained in Exh. AA) refers to the hauling of pumice from Paint Pot Crater and advises that imposition of the fee might be necessary "for maintenance of the road between your claims and the Highway 89."

Exhibit AA also contains a copy of a November 22, 1963, letter from the attorney for the Scott Estate, which had leased the claims to Stewart Masonry. That letter, directed to a Forest Service official, states:

> "It is my information, from hearsay, that about the year 1916 or 1917, there was installed on the pumice claims at or near Paint Pot Crater a cement block making machine, but due to the war conditions it was operated only a year to two and was discontinued. I believe this machinery has been entirely dismantled.

J. H. Scott acquired these claims about the year 1950... and there-

after set about having various tests made as to the quality of the pumice, and found it to be quite suitable for use in such projects as the Glen Canyon Dam, but due to the transportation costs he was not capable of meeting the bids from a closer source of pumice supply. Thereafter, but subsequent to 1955, he developed a market for the light rock, sometimes called "Feather Stone," which is used by nurserymen, and landscape planners, and found that he could haul and sell this material at a substantial profit.

* * *

We have now negotiated a contract with Stewart Masonry...and this company finds it convenient and profitable, and the material adapted to their uses. The transportation in this regard is merely a trucking haul from the claims to Redding.

However, I take the view that it is immaterial whether or not a profitable operation on the claims was conducted prior to July, 1955. A miner lives on hope, and the question simply is one of whether or not as a reasonable man he would spend money in an effort to produce a profitable material from the claims involved. Certainly, J. H. Scott spent hundreds of dollars testing the material in an effort to develop a market therefor. His tests proved the material suitable for the uses

> for which pumice is usually made, but due to transportation costs he was never able to develop a market to which he could ship the material." Emphasis added.

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The Forest Service official, District Ranger D. L. Biddison, responded to the above letter, informing the Scott Estate attorney that from the information provided he (the Ranger) believed "the claim is valid because a commercial use of a common variety was made before July 23, 1955." The only use described in the at torney's letter which could fall in that category was the reported operation of a concrete block machine for a year or two "about the year 1916 or 1917).

On February 5, 1966, Mrs. Stewart wrote the District Ranger after Stewart Masonry was requested to share in the maintenance costs for the Harris Springs Road. She said that in 1965 Stewart Masonry had used the road "a total of thirty six (36) times, which usage was substantially greater than prior years." She also indicated that continuation of the lease from the Scott Estate "may not be desirable."

The case record does not clearly establish that the removals by Stewart were from areas "1" or "2" on Exhibit 9. From his observation of the size of the trees which have taken root and grown, Mr. Ball testified at the hearing that the last working in those areas was at least eight years ago. Tr 86.

According to Mr. Ball, since 1965 the Forest Service has maintained a price of 20 cents per cubic yard for pumice which has been available from lands under its jurisdiction. However, there was no showing that sales have been made by the agency at that price or any price.

Future removals of pumice by the contestees, and their present plans for development of the contested claims are tied to utilization of the new means of access extending into Paint Pot Crater from the west. Exhibits 6A and 6B show that the entire system of roads lying to the west was lacking in 1961. A sixteen mile stretch of road with favorable grades was paved within the last few years at public expense under Forest Service contractual arrangements. In his cross examination the counsel for the contestees made it clear that this "newly paved road" is the one clients would use for transporting pumice, Tr. 51, 61-63, Tr. 76.

Mr. Ball conceded that workings on the claims have been there for some time, but he is not able to provide information on the specific time periods when the old excavations were made. On the basis of his investigation he does not consider any of the ten claims to be valid, Tr 80. He concluded from evidence on the ground and from the aerial photographs that very little or no pumice was removed "especially between.., July, '55 and July of '61", Tr 89. He remarked that "to take pumice out you have to have roads, because its a

low priced commodity and,,,if you were going to pack it out, it would be just for sampling." Tr 91,

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At the time of the hearing, blocks were being manufactured, and pumice was being sold from the location 10-12 miles to the east of the contested claims (the Tionesta area) where commercial pumice operations had been conducted in the mid-1950s. Tr. 100.

District Ranger Lynn Trail, an employee of the Shasta-Trinity National Forest, testified from Forest Service records as to quantities of pumice hauled by Stewart Masonry from the area of the contested claims from the summer of 1965 through 1970, An average of 23 loads was hauled annually in this six year period, If it is assumed that each load was 25 yards of material, Stewart Masonry would have obtained an average of 575 yards per year from the deposits west of Little Glass Mountain, Tr 106 - 108, This would have been taken on the "old route," down the Harris Springs Road, to Highway 89 and then to Redding, on roads lying generally to the south and west of the claims, Tr 114, 121,

Mr, Fred Underwood, one of the mining claimants, is a principal stockholder in Interstate Stone Company, of Medford, Oregon, the sole owner of Shastalite Block Company, in Yreka California, He purchased an interest in Interstate Stone in 1964, and obtained concrete

block equipment from Stewart Masonry in Redding, California, in the expectation that blocks would be manufactured at Medford. Because of the lack of funds, the Medford block plant was never placed in operation. Tr 139

In 1969 Interstate Stone bought Shastalite Block. Mr. Underwood stated that the previous owner had quit making pumice blocks because of the excessive cost of pumice. He had restricted his output to heavier cinder blocks, and his business had gone downhill to the point that he was forced to sell. Tr 140. Mr. Underwood took charge of the block manufacturing activities in Yreka, at first utilizing pumice purchased in Bend, Oregon. In the spring of 1971 the contestees learned that the unpatented Scott claims (the subject of this decision) might be available and they purchased the claims in the following summer.

In 1971, Interstate Stone (the contestees) hauled approximately 585 cubic yards of pumice on the "old route," through the McCloud Ranger Station. Tr 142, 145. Mr. Underwood asserts that in 1972 1280 cubic yards were hauled, using the same route, proceeding south and west out of the claims.

The records of the Forest Service show only 3 loads for 1972, but the explanation for this may be that a new truck driver for the mining claimants did not leave a record of each load at the Mc Cloud Ranger Station.

Expenditures on the claims by the contestees were $1086 in 1971, $2068.50 in 1972 and $3750 in 1973. Because of repeated "instances of sabotage to loading machinery" they stopped hauling pumice from the claims in 1972. According to Mr. Underwood "it (damage to machinery) got so bad that we even

sent our truck to Bend late in the fall of that year for a load of pumice to keep us going." Tr 150. They also obtained pumice from Bend in 1973 and 1974. No pumice was obtained from the claims in 1973 and 1974 up to the time the hearing was held. The added cost of maintaining a guard at the site to protect the loading equipment made continuation of the hauling operation infeasible. Tr. 195, 229.

Mr. Underwood tested the claims with an augur and found that granular pumice extended to a depth of at least three feet on Claim 1 and Claim 2. On some of the other claims he was not able to reach the bottom of the deposit--this was the situation on Claim 10, which is between Paint Pot crater and Pumice Mountain. Tr 156-158. His conservative estimate of the total quantity on the ten claims is approximately 12,900,000 cubic yards. He has concluded that it may run as much as 20,000,000 cubic yards. Tr 236.

When he was questioned about the present demand for pumice blocks, Mr. Underwood replied:

> "It's increasing. This is basically a timber area and masonry has come along slowly, but the in-

> creased price of timber, lumber due to the scarcity of timber, our block is becoming more and more competitive as the days go by. Tr 173.

Stewart Masonry of Redding operated without a crusher in its production line after the contestees acquired the claims under consideration, and no longer obtained pumice from those claims. Tr 174.

Mr. Underwood stated that "pumice is our prime interest" and that it was the only material that had been removed from the claim area and utilized. Tr 188. It was his understanding that Mr. Stewart had used pumice from the former Scott claims in 1964 or 1965. He is unable to state whether pumice was sold or removed from the claims in 1954 or 1955. Tr 189.

All excavations and removals of substantial quantities of pumice by the contestees have been from sites on Claims 13, 14, 15 and 16. The contestees, and the concerns which they operate, had not sold pumice to others. Tr 199. This would not have been practicable, since facilities for crushing the pumice had never been installed. Tr 201. The claims lie at altitudes above 6000 feet and due to snow conditions the contestees' work has been restricted to the summer months and part of the fall.

The improvement in access to the claims which was completed in 1973 was described by Mr. Underwood:

"...our hauling (in 1971 and 1972) was almost committed to the southern areas because that's the only access

22 IBLA 81

road that was feasible to operate a truck over. Since that time the road, I think it is known in the Forest Service as the Red Rock road, has been paved from Forest Service funds...and is within--I'm guessing--within 200 yards of the northern boundary of our northern claims. And with this in mind, the gentleman who is leasing the claims has now applied for a permit to operate over this road, which makes it much more accessible and less haul mileagewise." Emphasis added. Tr 214.

Mr. Underwood agreed that on the basis of their utilization of the material between 1971 and the date of the hearing "well over a thousand years supply" of pumice exists on the contested claims. Tr 237. He and his co-owners have made the claims available to a group which holds the claims under a 1974 lease and has plans for the removal of greatly increased quantities of pumice.

Another of the mining claimants, Mr. Jack D. Canon, has been in the block business since 1947. When he came to Medford in 1954, the Bend, Oregon, pumice deposits were the closest available source of material for block making in Southern Oregon. Tr. 240. He understood that Bert Stewart in Redding, California,

was obtaining his pumice in 1954 from another source--"some claims in Northern California." However, he is not sure that the pumice used by Stewart Masonry came from the claims which are the subject of this contest. Tr 242. He confirmed that he and the Underwoods had made no sales of pumice to others, indicating that they were "most interested in our lettle block plant in Yreka." Tr 261, 263.

Mr. Edward W. Morris and Mr. John R. Roof hold an interest in a new corporation, Pumice King Mining Company, which has leased the claims from the contestees. Mr. Morris executed a lease in 1973 after sampling some of the claims. The lease was re-executed in 1974, after Mr. Roof and a Mr. Warren decided to join him in an attempt to sell pumice from the claims. Tr 280.

Mr. Roof testified that in 1974 he looked into the question of the marketability of pumice, stating:

> "I determined the fact that our economic situation compared to a lot of the applications of pumice has changed; that there indeed was a profit to be gathered by the deposits up on the the ten mining claims..." Tr 291.

Some of the factors taken into account by Mr. Roof were (i) his determination that he could undercut the Bend pumice sales oparation on price in areas such as

Grants Pass and Medford, Oregon and Redding and Yreka, California (ii) that the pumice could be dyed and shipped for decorative or landscaping uses, and (iii) that in the current energy crisis pumice would be required for mising with soil to retain fertilizer, which is selling at inflated prices. Tr 292-294.

It is clear that Mr. Roof's plans are tied wholly and directly to the new paved Forest Service (Red Rock) road. The corporation established its "plant site" on that road, and Mr. Roof describes his transport plan as one under which trucks would go through MacDoel 100 miles to Yreka and 144 miles to Redding. Tr. 201, 312. Referring to the inadequacy of the access available prior to 1973, he said:

> "...I andmy wife had come down over that miserable road from Paint Pot Crater to McCloud. If I had to haul over that road I would have scrapped the whole venture right then." Tr 305

His plan is to take pumice from the claims to the plant site sixteen miles "over beautiful paved road; Forest Department road." Tr 302.

SUMMARY OF APPLICABLE LAW

The Act of July 23, 1955, 30 USC §611 (1970) amended the Materials Act of 1947, 30 U.S.C. Sec 601 (1970) to provide:

> "No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders...shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws ...." Common varieties...does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimenson of two inches or more*.* *"

Under the above-cited 1955 statute Congress withdrew, as of July 23, 1955, common varieties of sand, stone, pumice, pumicite and cinders from location under the mining laws; therefore, it is incumbent upon one who located a

claim prior to that date for a common variety of one of the materials listed in that Act to show that all the requirements for a discovery, including a showing that the materials could have been extracted, transported and marketed at a profit, had been met by that date. Palmer v. Dredge Corporation, 398 F2d 791 (9th Cir. 1968); Herb Penrose, 10 IBLA 332 (1973).

Once the Government has established a prima facie case that a discovery is lacking, the burden of producing pre-

ponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery falls upon the claimant. Foster v. Seaton, 271 F2d 836 (D. C. Cir. 1959); Independent Quick Silver Company, 72 I.D. 367 (1965).

The mining statutes do not expressly define a discovery. However, it has been held that one exists where:

* * *minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a profitable mine..." Castle v. Womble, 19 L.D. 457 (1894).

the above quoted definition is approved in United States v. Coleman, 390 U.S. 599 (1968), which holds that in determining whether a mineral deposit is valuable, the Secretary of the Interior may require a showing that there is a reasonable expectation based upon the circumstances known at the time that the mineral can be extracted, removed and marketed at a profit. It is stated in Coleman:

> "Under the mining laws, Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract be-

> cause there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus profitability is an important consideration in applying the prudent man test...."
>
> 22 IBLA 84

Expenditures for exploration or research, but not on the initiation of actual mining operations, are evidence only that further exploration or research may be justified. Such expenditures do not constitute evidence that the mineral exposed is valuable, or that prudentmen would be justified in initiating actual operations. Frank W. Winegar, et al., 16 IBLA 112, 128 (1974).

The following principle is set forth in United States v. Paul M. Thomas et al., 1 IBLA 209, 78 I.D. 5 (1971):

> "...it must be shown... that there was a valid discovery on each claim at the time of application for patent. That is, irrespective of the date on which a discovery may have been made, the claims are no invalid if, because of...change of economic conditions, cessation of a market for the material, or some other cogent factor, the value of the minerals will not justify further expenditures for the development of the mine."

This principle is of equal applicability to contest proceedings initiated prior to application for mineral patent. See Mulkern v. Hammitt, 326 F 2d 896 (9th Cir, 1964).

In this proceeding, it must be shown that J. H. Scott, who owned the unpatented placer claims on July 23, 1955, as to each claim had found a mineral deposit which, as of that date, satisfied the prudent man test as complemented by the marketability test. United States v. Bunkowski, 5 IBLA 102, 120 (1972); United States v. J. L. Block, 12 IBLA 393 (1973).

The logical conclusion to be drawn from the above rulings is that where common variety materials were not marketable July 25, 1955, or during a prolonged period subsequent to that date, any validity that an original location may have had is lost. The recovery in later years of a profitable market could not relate back to pre-1955 locations and restore validity to such locations.

Under the statute providing that no location of a placer claim on Federal lands should include more than 20 acres for each individual claimant, the individual transferee of an association placer claim of more than 20 acres who, after the transfer, made a discovery is not entitled to a patent to more than 20 acres immediately surrounding the discovery. United States Borax Company v. Ickes, 98 Fed 2d 271 (1938).

In United States v. Urban Harenberg, 11 IBLA 153 (1973) the Interior Board of Land Appeals concluded that the evidence showed that there had been a physical exposure of cinders (a common variety) on a claim prior to July 23, 1955. It stated, however, that the mere uncovering of the deposit was not enough to constitute a qualifying discovery. It must also be established that the deposit was valuable within the meaning of the mining law. The Board concluded that the value of the deposit is tested by economic standards "i.e., whether, prior to July 23, 1955, the material could have been mined, removed and marketed at a profit." In addition, it held that utilization of the material as base material for roads, common fill and the like would not validate that claim because the mining law has never countenanced the location of claims for such purposes.

the sale of minor quantities of material at a profit, or the disposal of substantial quantities at no profit, does not demonstate the existence of a market for the material obtained from a particular mining claim which would induce a man of ordinary prudence to expend his means in an effort to develop a valuable mine on the claim. Adrian Edwards, 9 IBLA 197 (1973). It is the obligation of a mineral claimant to maintain adequate business records or other means of proof to support his contentions as to sales and marketability at a profit of the mineral material in his claim. Herb Penrose, 10 IBLA 332 (1973).

ANALYSIS

The contested claims were located in 1916, perhaps for materials to be used in the experimental applications of pumice which are mentioned in Exhibit FF, perhaps for some other purpose. Certainly there is no indication in the case record that during the 45 year span immediately after the 1916 locations pumice from one or more of the claims was utilized commercially as aggregate or as an abrasive. This pumice is in a very remote location, and until 1974 could be transported only to the south and west, a route which one pumice block operation in Redding, California used in the 1962-1970 period. The contestees took pumice to Yreka over this route during portions of the 1971 and 1972 hauling seasons, but after that period of activity on some of the claims went back to a deposit near Bend, Oregon as their source of supply.

The California cournties which lie north of the City of Chico are sparsely populated, and are in timber country. Dimension lumber has been the most popular building material. As Mr. Underwood explained masonry blocks have been used for larger structures, such as schools or motels, with increased use when timber reached the peak of the price cycle.

The pumice concerns which have disposed of substantial quantities for use as aggregate (e.g. those located

near Tionest and Napa, California, and near Bend, Oregon) have enjoyed, until the last year or so, a great advantage over those who contemplated developing the contested claims. The other deposits are a relatively short distance from a good highway or railroad. In contrast the road from the claims down to Highway 89 provided poor access. The lessee of the mining claimants, Mr. Roof described it as a "miserable road" that he would not have used for pumice hauling.

Some pumice had been loaded and utilized(or at least moved to another location) from two locations on Claims 14 and 15, prior to August 1, 1955. this pumice could have been used on the roads in the area. It could have been moved when excavations were made in the course of exploration or as part of assessment work. There is no proof that pumice from these claims was being transported to the Redding block plant during the 1950s. Exhibit 9 shows that in 1955 there were no roads into or near Claims 1, 5, 9 and 13. That exhibit also shows that there are no excavated or scraped areas on Claims 2, 6, 10 and 16.

The 1963 letter from the attorney for the Scott Estate confirms the conclusion drawn by the contestant's mining engineer--that a discovery of valuable minerals never existed on any of the claims prior to July 23, 1955. He referred to a short-lived effort to make cement blocks prior to 1920, the inability to compete when pumice was

purchased for Glen Canyon Dam and the use of some pumice in landscaping "subsequent to 1955). There is no reference to a use of, or requirement for, the pumice for blocks in Redding or Yreka in 1955, or even in 1960. There is no evidence that the increased need for pumice in the 1939-1945 period resulted in renewed activity or production on these claims.

In 1955 vast quantities of useable pumice existed in Northern California, and the pumice required for commercial uses in the mid-1950s was supplied by concerns that were more favorably located from the standpoint of the type of available road, and the distance from the deposit to a major transportation artery.

There is no proof of this, but if the Stewart plant at Redding had obtained and profitably utilized more than 500 cubic yards per year from area "1" or area "2" depicted on Exhibit 9 during the time period required by the statute (rather than one commencing in 1962 or 1963), it could be ruled that the Scott Estate had a discovery on a claim surrounding one of those areas. There are at least 100,000 to 200,000 cubic yards of pumice on each 20 acre area within the better parts of Claims 14 and 15. Thus one 20 acre location would have provided a supply for the Stewart operation for more than 100 years.

The above analysis serves to place this contest in perspective. Finding pumice on public lands, establishing claim boundaries and performing assessment work year after year is not the same as having a commodity which could have been marketed at a profit. It is clear that the 1974 plans and expectations of the Pumice King group, the lessee of the mining claimants are wholly related to the new paved Forest Service road which makes it feasible to transport pumice to a rail facility at MacDoel, and to reach Yreka, Medford and Grants Pass over a much shorter route. This means of access has nothing to do with the circumstances in 1916 or 1955. When the Congress withdrew common varieties of pumice from location under the mining laws in 1955, it provided for disposals of such pumice by agencies upon the payment of adequate compensation. A common variety of pumice which becomes transportable and marketable as the result of completion of a new Forest Service road fifteen or twenty years after such Congressional action obviously should be sold pursuant to the 1955 legislation. The new road cannot give new life to invalid old claims.

FINAL CONCLUSION

Mr. Ball's testimony and the documents and photographs introduced when he testified established a prima facie case that each of the contested claims lacked a discovery of a valuable mineral prior to and on July 23, 1955. The pumice on the claims is a common variety material.

Much of the evidence submitted on behalf of the mining claimants is confirmatory of the first charge in the complaint. Exibit FF, for example, describes the producing pumice operations that were readily accessible by rail or highway. That exhibit, a 1956 publication, also states that the latest recorded production from the "abandoned" Paint Pot Crater pit was in 1935. Exhibit 16 shows that the last of the original locators included the claims in a Deed of Trust when he borrowed $5,000 in 1936, and by the fall of 1941 his interest had passed to his creditors. The claims were transferred to individuals five times between October, 1941 and 19481. The record for 1954, just one year prior to the significant year in this contest, demonstrates a serious decline in the need for pumice. There is no evidence in the case record to indicate that the outlook for profitable disposal of pumice from any area on the claims was favorable during the two or three decades immediately prior to July 23, 1955.

The contestees have not shown by the preponderance of the evidence that a discovery of a valuable mineral existed on or prior to July 23, 1955, on any of the placer claims which are the subject of this contest. Accordingly, the contested claims known as Pumice Stone Mine Nos, 1, 2, 5, 6, 9, 10, 13, 14 15 and 16 are hereby declared null and void.

A review of the second charge in the complaint, that the lands within the boundaries of the claims are not "mineral in character" would be largely concerned with the factors discussed above. For example, an inquiry would be required as to the profitability of pumice disposal or utilization, and as to the feasibility of expending funds for development. When the

issue raised by this charge is considered, the prescribed standards are applied to ten acre units. See State of California v. E. O. Rodeffer, 75 I.D. 176 (1976) and U.S. v. Henrikson, 70 I.D. 202 (1963). Because the parties directed their presentations primarily toward the first issue (lack of discoveries of a valuable mineral at the required time) and the case record in my view calls for only one conclusion on that issue, I will not give further consideration to the second charge.

/s/ Dean F. Ratzman
Administrative Law Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

C. FRED UNDERWOOD, CHLOE UNDERWOOD, and JACK D. CANON,	)	Civ. No. S76-91 PCW
Plaintiffs,	)	
v.	)	
THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM AND ORDER

This action seeks a review under the Administrative Procedure Act, 5 U.S.C. Sec. 701, et seq. of a decision of the Secretary of Interior that certain mineral claims held by the plaintiffs are void. United States v. C. Fred Underwood, IBLA 75-401, 22 IBLA 62 (1975). 1/ The plaintiffs invoke this Court's jurisdiction under 28 US.C. Sec. 1331. Both parties have moved for summary judgment, Fed. R. Civ. P. 56. The parties have submitted the matter for decision upon their briefs and without oral argument.

BACKGROUND

The mineral claims at issue in

1/ This citation is to Volume 22 of the decisions of the Interior Board of Land Appeals, hereinafter cited in this decision as 22 IBLA, as indicated in the official administrative record herein.

this action were originally located in May, 1916. There are ten claims in all, covering 1600 acres of public land in Siskiyou County, California. The principal mineral of value upon these claims is pumice, a volcanic rock. The subject claims lie in an area of pumice which is at least 16 miles square; another area 10 miles square lies 10 miles to the east. In the past most of the pumice produced from the general vicinity of the subject claims has been mined in the latter area. The subject claims are remote, and until recently only poor roads served the, while the second area has had good transportation facilities for some time. In 1973 the Forest Service built a good road which improved access to the subject claims. In general, the pumice from both areas is well suited to use as a concrete aggregate in concrete blocks, andis used for this purpose. All of the above facts were contained in exhibits submitted in the administrative proceedings, and were uncontroverted. See 22 IBLA 75.

There was some evidence of production on the subject claims as early as 1916. At no time has production been extensive, although since the mid-sixties it seems to have increased. There was no dispute that the annual work necessary to keep the claims valid was done. The claims have never been patented.

The plaintiffs purchased the claims in 1971 from the Scott estate. Mr. Scott had originally acquired them in 1950. He attempted to work the claims

himself during the fifties. His estate leased them to a masonry company in the early sixties, which hauled pumice from the claims for a few years, but then stopped sometime around 1966. The plaintiffs originally purchased the claims to supply their cement block factory in Yreka, California. They produced some pumice, but then experienced equipment difficulties and stopped production in 1973. In 1974, they leased the claims to a newly formed corporation which contemplates extensive production.

Under the mining laws "all valuable mineral deposit s in lands belonging to the United States , . . shall be free and open to exploration and purchase..." 30 U.S.C. Sec 22. A mining claim is initiated by entry and location, which protects the claimant from rival claimants. However, the claimant obtains no rights against the United States until there has been a discovery of a valuable mineral deposit. 30 U.S.C. Sec 23; Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). In 1955, Congress withdrew from discovery common varieties of pumice. Uncommon varieties of pumice, those with "distinct and special value" or "block pumice...having one dimension or 2" or more..." were not withdrawn. Therefore, for a pumice claim to be valid after 1955 one of three conditons must exist: (1) A valuable discovery of common pumice must have been established by the date of wi hdrawal, July 23, 1955; (2) the claim must consist of "block pumice"; or (3) the claim must consist of pumice with "a distince and special value."

The Bureau of Land Mangement, Department of Interior, filed a "Contest of Mining Claim" dated July 27, 1973 with the Delpartment's Office of Hearings and Appeals, alleging that a valuable discovery had not been disclosed on the subject claims before July 23, 1955, and seeking that the claims be declared "null and void." The matter came on for hearing on September 12 and 13, 1974. The Administrative Law Judge (hereinafter "ALJ") found that no valuable discovery had been disclosed as of July 23, 1955, that the pumice was of common variety, and that therefore the claims were void. 22 IBLA 88. The Interior Department Board of Land Appeals (hereinafter "Board") affirmed in an opinion dated September 18, 1975. United States v. Underwood et al. IBLA 75-401, 22 IBLA 62 (1975).

The plaintiffs, contestees in the administrative proceedings, filed the complaint in tne instant action on February 9, 1976, alleging ten errors by the Board and seeking review of these alleged errors under the Administrative Procedure Act, 5 U.S.C. Sec. 701, et seq. They allege errors both of fact and of law, and seek reversl of the Board's decision and either a declaration that their claims are valid, or remand to correct any error found by this Court. Most of the alleged errors fall into three categories corresponding to the three possibilities for a valid claim under the 1955 Act withdrawing pumice discussed above. The Court will address these three categories, then discuss

the remaining alleged errors; but first the standard for reviewing the agency's decision must be defined.

STANDARD OF REVIEW

This Court's power to review administrative decisions under 5 U.S.C. Sec 701 et seq., , is limited to setting aside agency actions which are "arbitrary" and "capricious", 5 U.S.C. Sec 706(2)(a), or which are "unsupported by substantial evidence," 5 U.S.C. Sec.706(2)(E). The scope of review under these standards is extremely narrow. Multiple Use, Inc. v. Morton, 504 F2d 448, 452 (9th Cir. 1974). This Court may not substitute its judgment for that of the agency, and must respect the agency's expertise. Id.

After reviewing the factual record in its entirety, this Court must affirm the agency's decision if based upon "substantial evidence." "Substantial evidence" means enough relevant evidence to support a reasonable conclusion; it does not mean that the agency's decision must be supported by the weight of the evidence. Therefore this Court may not weigh the evidence, or choose between inconsistent conclusions reasonably supported by the evidence. Rather, this Court must simply determine if the Board's decision in the instant case is reasonably based upon relevant facts in the record. Consolo v. Federal Maritime

Commission, 383 U.S. 607, 620 (1966); Multiple Use, Inc. v. Morton, 353 F Supp. 184, 188-89 (D. Ariz. 1973), aff'd 504 F2d 448 (9th Cir. 1974). A finding of substantial evidence in support of the Board's decision, or a finding of the lack thereof, is a conclusion of law, and therefore disposition of this complaint by summary judgment, Fed. R. Civ. P. 56, is appropriate. Dredge Corp. v. Penny, 338 F2d 456, 462 (9th Cir. 1964).

DECISION

The 1955 Act, 30 U.S. C. Sec. 611, withdrew from discovery common varieties of pumice. The claimants' principle argument is that a valuable discovery of common pumice had been established by then, so that the withdrawal does not affect their claims. The Board concluded otherwise, that there was "no discovery of a valuable mineral deposit as of July 23, 1955," and that therefore the claims are void. 22 IBLA 66. This conclusion rests upon the ALJ's application to the evidence presented of a test for a valuable discovery known as the "prudent man" test, as qualified by a "marketability" test. 22 IBLA 85. The claimants argue that the incorrect test was applied, and that under the correct test there is not substantial evidence supporting the Board's conclusion.

The mineral laws do not define a valuable discovery. Early cases referred to a "prudent man" test, Castle v. Womble, 19 L.D. 457 (1894), which

later courts qualified with an economic test termed the "marketability" test. The Supreme Court explained these tests in U.S. v. Coleman, 390 U.S. 599, 602-603:

> Under the mining laws Congress has made publiclands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent man test, and the marketability test...merely recognizes this fact. (emphasis added)

The tests applied by the Board, see 22 IBLA 63-66, and by the ALJ, see 22 IBLA 83-86, are entirely consistent with these principles. This Court concludes, therefore, that the Board did not act arbitrarily or capriciously and applied the true test for a valuable discovery.

One of the claimants' contentions is that the Board applied the incorrect rule in weighing evidence of non-production. It is true that actual production at a profit is not a necessity for a valuable discovery. Barrows v. Hickel, 447 F2d 80, 82 (9th Cir. 1971). It is also true that evidence of non-production standing alone will not support a finding of no valuable discovery when positive evidence to the contrary exists. Verrue v. U.S., 457 F2d 1202,

1204 (9th Cir. 1972). Evidence of non-production is, however, certainly cogent evidence that a valuable discovery does not exist. The Board recognizes this by shifting the burden of proving a valuable discovery to the claimant once the government has proven non-production. This rule is consistent with the cases, and therefore this Court can not conclude that it is arbitrary.

There remains the question whether substantial evidence supports the Board's factual conclusion. To answer this question the Court must review the entire record of the administrative proceedings. Multiple Use, Inc. v. Morton, 504 F.2d 448, 452 (9th Cir. 1974). Having considered the record in its entirety, the Court finds that the Board's finding that a valuable discovery did not exist on July 23, 1955, is substantially supported by the evidence.

Much of the record concerns the value of the instant claims in the period after 1955. There is little doubt that the claims are presently valuable, or that the pumice was commercially useful in 1955. The relevant inquiry is, however, whether preceding withdrawal of common pumice on July 23, 1955, the claims were marketable under the prudent man test. None of the witnesses who testified at the hearing had personal knowledge of the claims' marketability at that time. Substantial documentary evidence concerning the

situation in 1955, and testimony based upon this evidence, however, establishes that no valuable discovery then existed.

The claimants introduced exhibits outlining the factors which affect the market in common pumice in California. Exhibit EE, quoted at 22 IBLA 75, and Exhibit FF, quoted at 22 IBLA 71. These showed that the market for common pumice expanded greatly after World War II, with a temporary decline in 1954, principally because of increased use as an aggregate in the manufacture of concrete blocks. Abundant supplies suited to this use exist in California including the instant claims. This abundance, and the availability of low-priced substitutes for construction, creates a competitive market in which transportation costs are a major factor in the profitability equation for common pumice.

The government introduced aerial photographs of the area taken in 1955. Exhibit 9. The government's expert witness testified that these showed the lack of good roads into the remote area. A letter written in 1963 from the Scott estate's attorney to the Forest Service substantiated what the photographs reveal-- that Scott, the owner in 1955, could not profitably exploit the claims then because of the high costs of transporting the pumice. Exhibit AA.

The government's expert also testified that only two areas on the claims had been mined by 1955, based upon the

1955 aerial photographs. He also concluded that only limited amounts of pumice had been removed, Tr 89. The Scott estate letter spoke only of tests by Mr. Scott in the early fifties. Exhibit AA. There was no evidence that any of the pumice removed in the early fifties had been sold.

Exhibit FF, quoted at 22 IBLA 71-74, describes pumice production in the vicinity of the subject claims in the mid-fifties. The report states that the last recorded production from the claims was in 1935. Exhibit FF, at28.

Finally, the government's expert testified that in his opinion none of the ten claims were valid. He based his opinion upon his inspection of the claims in 1971, and his analysis of the 1955 aerial photographs. Tr 80-91.

The claimants offered no evidence to negate the above, nor any positive evidence of marketability in 1955. See Multiple Use, Inc. v. Morton, 457 F2d 1202, 1204 (9th Cir. 1974). The government's evidence, and the claimants' documentary submissions, tended to prove that no profitable production had actually taken place by 1955. This evidence also showed that transportation costs at the time, due to the inadequate roads, precluded profitable exploitation of the claims. It reasonably follows from this evidence that a prudent man would not have believed that pumice could have been extracted, removed and sold at a profit from these claims in 1955. See U.S. v. Coleman, supra. Therefore, the Court finds that substantial evidence supports the Board's conclusion that a valuable discovery did not exist

on the instant claims on July 23, 1955, and that the claims are therefore void.

The 1955 Act withdrawing "common varieties" of pumice excepts "block pumice" and pumice of "distinct and special value." 30 U.S.C. Sec. 611. Thus a discovery of either of these varieties of pumice need not have been made by July 23, 1955. The claimants did not argue the unique qualities of their pumice claims at the hearing. 22 IBLA 68. This Court must determine whether the Board's conclusion finds substantial support in the record.

The 1955 Act defines "block pumice" as that "having a dimension of two inches or more," 30 U.S.C. Sec. 611. The legislative history suggests, without specifying, that the dimension was intended to define a kind of pumice suited to a particular use. H.R. Rep. No. 730, 84th Cong., 1st Sess. 9 (1955). The Board infers that Congress had in mind the use of block pumice as an abrasive, since that is the typical use for pumice in block form. U.S. v. Paul M. Thomas, et al., 78 I.D. 5, 10 n. 3 (1971). Not all pumice with one dimension of two inches, however, is of abrasive grade. Thus, the Board requires proof that pumice is marketable as an abrasive, as well as its having a dimension of two inches, before applying the "block pumice" exception to the 1955 Act's withdrawal of pumice See U.S. v. Paul M. Thomas, et al., supra.

The claimants attempt to bring their pumice claim within the favored class of "block pumice" by pointing to references in the hearing transcript indicating that two inch chunks of pumice could be found on the claims. For example, the government's expert witness testified that the pumice ranged to two inches in size. Tr 15. Thus, the claimants contend, there was not substantial evidence sustaining the Board's conclusion.

The claimants' own testimony, however, defeats their effort. They repeatedly emphasized that their sole intent was to use the pumice as a building material. See e.g. Tr 190 and 266. Even after describing tests and observations of the claims which showed "chunks" of pumice existed, one of the claimants testified only as to the suitability of the pumice for use as a concrete aggregate. Tr 154-59. In the entire record the claimants, despite their references to the "chunks", never state that the pumice is suitable for use as an abrasive, or that they intend to so suse it. Thus, a reasonable inference can be drawn that they did not believe the pumice suited to abrasive uses.

The government's expert testified that there was no block pumice on the claims. Tr 9. He based his conclusion on a visit to the site. Tr 15. No evidence introduced by the claimants negates this conclusion.

This Court is of the opinion that the interpretive gloss placed by the Board on the 1955 Act's definition of "block pumice" is not arbitrary or capricious, but rather a reasonable interpretation of Congress' intent. This Court is mindful of the agency's expertise in these matters, and of the respect due that expertise. See Multiple Use, Inc. v. Morton, 504 F2d 448, 452 (9th Cir. 1974). This Court is also of the opinion that substantial evidence supports the Board's conclusion that there is no "block pumice" as defined by the 1955 Act on the subject claims.

The claimants' final argument is that the pumice has "distinct and special value," and therefore is removed from the proscriptions of the 1955 Act. This argument has many facets, but its essence is that the pumice is ideally suited to use as a concrete aggregate and that such material is not so abundant that it should be considered a "common variety:" under the Act. The claimants' own documentary submissions negate this argument. These submissions show that most of the pumice produced in California was used as a concrete aggregate, Exhibit FF, at 23, and that nation-wide 32% of the pumice consumed is for such use, Exhibit CC, at 1011. The 1955 Act does not require that pumice be economically worthless to be "common". Rather, the Act seeks to distinguish between pumice suited for common uses and that suited for special uses. The claimants' submissions demonstrate that this pumice is suited to a common use, and therefore the Board had substantial evidence to conclude that the pumice was a "common variety," 22 IBLA 68.

There remain a number of lesser issues raised by the claimant s. First, the claimants allege the question of marketability was not properly before the ALJ or the Board because it was not alleged in the original complaint. This allegation is devoid of merit, since marketability inheres in the determination of whether there was a valuable discovery, an issue squarely raised by the original complaint. Second, the claimants allege that the Board failed to rule on their 41 requested findings of fact, as required under 5 U.S.C. Sec. 557(c). The record shows, however, that the Board considered the proposed findings and either expressly, or impliedly, adopted or rejected them; or, did not decide them because they were immaterial to the decision. See Order dated 1-28-76 replying to the request for findings of fact. This suffices under the statue, and therefore this alleged error must also be rejected. Borek Motor Sales, Inc. v. N.L.R.B., 425 F 2d 677, 681-82 (7th Cir. 1970). The record demonstrates that the claimants received the full and fair airing of the facts to which they are entitled under the Administrative Procedure Act. The claimants' final alleged error is that the administrative determination that their claims are invalid for lack of a valuable discovery violated their right to compensation for deprivation of a vested right under the 5th Amendment to the Constitution. This contention has been consistently rejected. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-40 (1968); United States v. Springer (Springer II), 491 F2d 239 (9th Cir. 1974), and this Court finds it without merit.

The plaintiff has requested findings of fact, and has made 41 such requests. While the Court feels that it need not make such findings in ruling on these motions, this memorandum and order shall constitute such findings of fact and conclusions of law. Fed R. Civ. P. 52.

After carefully reviewing the administrative record, the Court concludes that the Secretary of the Interior applied the correct test for a valuable discovery and for uncommon varieties of pumice, and that his decision that the Plaintiffs' claims are null and void finds substantial support in the evidence on record. Accordingly, the Secretary's decision was neither arbitrary nor an abuse of discretion, and must be affirmed.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment be, and the same is, hereby denied.

IT IS FURTHER ORDERED, that defendant's motion for summary judgment be, and the same is, hereby granted.

DATED: June 22, 1977.

/s/ Philip C. Wilkins
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF CALIFORNIA

C. FRED UNDERWOOD ET AL) Plaintiffs, v. THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA, Defendant.	Civil Action File No. S-76-91 PCW JUDGMENT June 23, 1977

This action came on for hearing before the Court, Honorable Philip C. Wilkins, United States District Judge, presiding and the issues having been duly heard and a decision having been duly rendered June 22, 1977.

IT IS ORDERED AND ADJUDGED that plaintiffs' motion for summary judgment be and the same is, hereby denied;

IT IS FURTHER ORDERED AND ADJUDGED that defendant's motion for summary judgment be, and the same is, hereby granted.

Judgment is hereby entered in favor of defendant and against plaintiff.

Dated at Sacramento, California, this 23rd day of June 1977.

/s/ James R. Grindstaff,
Clerk of Court
By s/s L. Minor,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C. FRED UNDERWOOD, CHLOE UNDERWOOD, and JACK D. CANON, Plaintiffs-Appellants,	)	No. 77-3578
v.	)	ORDER
THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA, Defendant-Appellee.	)	May 1, 1980

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Before: THORNBERRY*, SCHROEDER and FARRIS, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing.

*Honorable Homer Thornberry, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation

30 U.S.C. Sec. 611 Common varieties of sand, stone, gravel, pumice, pumicite, or cinders, and petrified wood

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611 to 615 of this title means agatized, opalized petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

July 23, 1955 c. 375 Sec 3, 69 Stat. 369; Sept 28, 1962, Pub. L. 87-713 Sec 1, 76 Stat. 652.

Supreme Court, U.S.
FILED
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No. 80-145

In the Supreme Court of the United States

OCTOBER TERM, 1979

C. FRED UNDERWOOD, CHLOE UNDERWOOD AND JACK D. CANON, PETITIONERS

v.

THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Secretary's determination, sustained by the district court and the court of appeals, that the pumice on petitioners' claims is not "block pumice" within the meaning of 30 U.S.C. 611 is based on a correct reading of that statute.

2. Whether the court of appeals misapplied the substantial evidence standard in its review of the Secretary's resolution of factual issues.

3. Whether the district court erred in basing its decision on the administrative record and motions for summary judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-4) is not reported. The opinion of the district court (Pet. App. A-51 to A-65) is not reported. The opinion of the Interior Board of Land Appeals (Pet. App. A-5 to A-16) is reported at 22 I.B.L.A. 62. The decision of the administrative law judge (Pet. App. A-17 to A-50) is reported at 22 I.B.L.A. 70.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1980. A timely petition for rehearing was denied on May 1, 1980 (Pet. App. A-67). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, as amended, 30 U.S.C. 611, provides:

> SEC. 3. No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occuring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in this Act means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

STATEMENT

On July 27, 1973, at the request of the Forest Service in the Department of Agriculture, the Department of the Interior, through its Bureau of Land Management, issued a contest complaint seeking cancellation of petitioners' 10 unpatented placer mining claims. The claims were located on 1,600 acres of public land in Shasta-Trinity National Forest, Siskiyou County, California. The principal mineral of value upon these claims is pumice ranging in size from very fine up to an occasional piece two inches in dimension. Petitioners purchased the claims in 1971, intending to use the pumice to supply their cement factory in Yreka, California.

Following an evidentiary hearing, the administrative law judge sustained the allegations of the complaint (Pet. App. A-17 to A-50), finding that the pumice on the claims was a "common variety material" (*id.* at A-48), that petitioners had not established a "valuable mineral discovery" on the claims prior to July 23, 1955, when Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, as amended, 30 U.S.C. 611 (hereafter "the Common Varieties Act") was enacted, withdrawing from location under the mining laws certain common varieties of minerals including pumice (Pet. App. A-45 to A-49),[1] and that the claims were therefore void (*id.* at A-49). The judge's holding that there had been no valuable mineral discovery before the critical date in 1955 was based on extensive findings (*id.* at A-18 to A-44) concerning the market for pumice and the use made of pumice deposits

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[1]Rights attendant to unpatented mining claims, located pursuant to the federal mining laws, 30 U.S.C. 21 *et seq.*, are described in *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 605-607 & nn. 3-4, 615-616 (1978), and *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 335-336 (1963).

on the claims during the relevant period, which led him to conclude (*id.* at A-45 to A-49) that the record did not show that the pumice could have been marketed at a profit before July 23, 1955.

The Secretary of the Interior, acting through the Interior Board of Land Appeals ("IBLA"), affirmed the decision of the administrative law judge (Pet. App. A-5 to A-16). The IBLA held (*id.* at A-7 to A-12) that the government had made a *prima facie* showing that the pumice was not marketable before the effective date of the Common Varieties Act and that petitioners had not rebutted that showing. The IBLA also (*id.* at A-12 to A-14, A-15 n.2) rejected petitioners' contentions that the pumice on their claims was still locatable under the mining laws because it came within exclusions from the coverage of the Common Varieties Act for pumice having "distinct and special value" and for "so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more." 30 U.S.C. 611. In accordance with an earlier IBLA decision, *United States* v. *Thomas,* 78 I.D. 5, 10 n.3 (1971), the IBLA equated "block pumice" with pumice used for abrasives, and found no evidence that pumice suitable for "scouring blocks" existed on the claims (Pet. App. A-15 n.2); it also noted (*ibid.*) that the contention that the pumice at issue was "block pumice" had not been raised before the administrative law judge.

Petitioners sought judicial review in the United States District Court for the Eastern District of California. On cross-motions for summary judgment, the district court upheld (Pet. App. A-51 to A-65) the IBLA's conclusion that petitioners' claims are void, finding, after a review of the administrative record "in its entirety" (*id.* at A-58), that the conclusion was supported by substantial evidence (*id.* at A-58, A-65).

The court of appeals affirmed (Pet. App. A-1 to A-4), specifically upholding the IBLA's determination of the pre-1955 marketability issue (*id.* at A-2 to A-3) and its conclusions that the pumice on petitioners' claims was not excluded from the coverage of the Common Varieties Act either as pumice having "distinct and special value" or as "block pumice" (*id.* at A-3 to A-4). The court agreed with the IBLA that the latter exclusion was not an exclusion for any type of pumice that is found in pieces of the specified dimension but rather refers to a special kind of pumice, "used in block form as an abrasive," that occurs in pieces of that size (*id.* at A-4).

ARGUMENT

The decision below is correct, conflicts with no decision of this Court or any court of appeals, and presents no issue warranting review by this Court.

1. Petitioners contend (Pet. 16-23) that the court of appeals erred in upholding the agency's reading of the reference in 30 U.S.C. 611 to "so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more" as a reference to a type of pumice that occurs in pieces of the indicated size and that is marketable as an abrasive. They argue that pumice occurring in pieces of that size comes within the exclusion regardless of the use for which it is produced, and that therefore pumice having such dimensions is still a locatable mineral under the mining laws.

The statute contains no definition of the term "block pumice," but its legislative history suggests that it refers to a type of pumice characterized by something in addition to mere size. Thus, the relevant House committee report. states that in excluding "block pumice" from the common varieties category, the committee intended to exclude "a

class of pumice having distinct and special properties." H.R. Rep. No. 730, 84th Cong., 1st Sess. 9 (1955).[2]

The technical literature on pumice indicates that only abrasive grade pumice, which occurs in nature in large chunks or "blocks," has any such distinct and special properties. Thus, in Bureau of Mines Bulletin No. 630, *Mineral Facts and Problems* 736 (1965), pumice is defined as follows:

> Under various conditions pumice competes as a lightweight aggregate with expanded clays and shales, expanded perlite, exfoliated vermiculite, slag, cinders, and diatomite * * *.
>
> *As an abrasive in block form*, pumice competes in the market with brick made from silicon carbide, aluminum oxide, and natural rock such as novaculite and sandstone.
>
> Pumice used as a concrete aggregate, railroad ballast, and for road surfacing is sold in a low price market and must compete with many substitutes. Hence the market area for any deposit is limited by transportation costs and the availability of competitive materials. *As abrasives, pumice sells at a much higher average unit price, transportation is a smaller part of the total cost, and shipments are made over much greater distances. High quality pumice is imported from foreign sources in crude form for processing*

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[2]The statements made by Raymond Halbrook of the American Mining Congress, concerning the block pumice exemption, in the course of the committee hearings on the Act and relied upon by the petitioners (Pet. 19-21) have little weight in comparison with House Report. Statements made by persons not responsible for the drafting of a bill are entitled to little weight. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976); *United States* v. *United Mine Workers*, 330 U.S.258, 276-277 (1947).

domestically for abrasive purposes. [Emphasis added.][3]

On the basis of the House committee report and the relevant technical literature, the Secretary of the Interior, through the IBLA, has reasonably concluded that to come within the exclusion for "block pumice," pumice must be of an abrasive grade. As the court of appeals correctly observed (Pet. App. A-4), an agency's construction of a statute it administers is entitled to great deference. *United States* v. *Rutherford*, 442 U.S. 544, 553-554 (1979); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). Here such deference was entirely appropriate. The agency's reading is consistent with the language of the Act: had Congress intended to allow location under the mining laws of *any* pumice occurring in pieces of the specified size, it would have had no need to add the term "block pumice." And it is consistent with the congressional purpose of permitting continued location of pumice claims only where the pumice has "distinct and special properties," to refuse recognition to claims containing pumice that—as is the case here—is to be produced for the most common uses of that material (see Pet. App. A-12 to A-14, A-35 to A-38).

2. Petitioners also contend (Pet. 23-26) that the court of appeals applied an inappropriate standard of review. Petitioners erroneously suggest (Pet. 23) that the court simply deferred to agency expertise instead of determining whether the decision was supported by substantial

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[3]Similarly in Department of Natural Resources, State of California, Bulletin No. 174, *Pumice, Pumicite and Volcanic Cinders in California* 26-27 (1956) (see Pet. App. A-15 n.2, A-18 to A-19) block pumice is identified as "[p]umice suitable for the manufacture of scouring blocks." Significantly, that bulletin also described places where "block pumice" occurs in Northern California, indicating that it does not exist in the area of petitioners' claims (Pet. App. A-15 n.2).

evidence on the record considered as a whole. In fact, the court of appeals' deferral to the agency was only with regard to its construction of the statute. On the only factual issue raised before it—the question of the marketability of the pumice on the claims before the effective date of the Common Varieties Act—the court determined (Pet. App. A-2) that "[t]he record contains substantial evidence to support the [IBLA's] finding of non-marketability." The district court had applied the same standard in its review of the IBLA decision, reaching its conclusion only after examining the record "in its entirety" (Pet. App. A-58). The conclusion of both courts below that the agency determination was supported by substantial evidence is correct,[4] and further review by this Court would be inappropriate. See *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503 (1951).

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[4]In their argument, petitioners cite no specific error in the court of appeals' assessment of the record, but merely argue (Pet. 23-27) in general terms that the court applied an incorrect standard. In their statement, petitioners suggest (Pet. 8-12, 15) that the agency finding of nonmarketability prior to July 23, 1955, was unsupported by the record because certain evidence showing marketability was ignored. Specifically they mention testimony by two of the petitioners and two other witnesses alleged to have established pre-1955 marketability of the pumice on the claims at issue (Pet. 12) and a 1955 aerial photograph showing that the contested claims had been mined prior to 1955 (Pet. 10-11). But the district court took note of petitioners' witnesses' testimony concerning pre-1955 marketability and observed (Pet. App. A-58) that none "had personal knowledge" on the subject. The IBLA had discounted such testimony for similar reasons (*id.* at A-9 to A-11). The district court also noted (*id.* at A-60) that a government witness had testified that the 1955 photograph indicated that "only limited amounts of pumice had been removed." At bottom petitioners' complaint is that the reviewing courts declined to reverse the IBLA after themselves re-weighing all the evidence, a task that is beyond the proper scope of their review. *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966).

3. Finally, petitioners contend (Pet. 26-27) that the district court erred in deciding the case on summary judgment motions. They did not make this contention in the court of appeals, and there is no reason for this Court to depart here from its customary practice of declining to review issues not raised or resolved in the courts below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

In any event, there is no merit to the argument. Petitioners rely on *Nickol* v. *United States*, 501 F. 2d 1389, 1390 (10th Cir. 1974); but the *Nickol* court acknowledged that, as to agency decisions based on evidentiary hearings, judicial review is "limited to an examination of the administrative record to determine if there is substantial evidence to support the agency's determination" and that "additional evidence is not to be admitted." 501 F. 2d at 1390. The court of appeals' essential objection to the use of the summary judgment procedure in that case appeared to be that the district court had failed to write any opinion discussing the record evidence. 501 F. 2d at 1390-1391. Here the district court wrote such an opinion. Since, as noted, the court was not empowered to take evidence and decide the case *de novo*, petitioners have no cause to complain that the case was decided on summary judgment motions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

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